

Committee on Resources

Witness Testimony

TESTIMONY OF JAMIE RAPPAPORT CLARK, DIRECTOR, FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE HOUSE, COMMITTEE ON RESOURCES, ON IMPLEMENTATION AND ENFORCEMENT OF THE ENDANGERED SPECIES ACT.

March 5, 1998

Mr. Chairman, I appreciate this opportunity to discuss the Endangered Species Act. I am accompanied by LaVeme Smith, Chief of our Division of Endangered Species; Mike Spear, the Regional Director of our Region 1; Renne Lohofener, Assistant Regional Director for Ecological Services, Region 2; John Blankenship, Assistant Regional Director for Ecological Services, Region 3; Dave Flemming, Chief of the Regional Endangered Species Office, Region 4; and Paul Nickerson, Endangered Species Coordinator, Region 5. It is my hope that I can provide the Committee with direct responses to any questions that members may have, but if I cannot, I will turn to one or more of these experts.

Today, the U.S. Fish and Wildlife Service (Service) is working more closely than ever before with the National Marine Fisheries Service to improve the efficiency and effectiveness of the Endangered Species Act (ESA). We have instituted bold reforms that have, in many respects, revolutionized species conservation in the United States and made implementation of the ESA more effective and efficient in conserving species while also providing greater flexibility and certainty to businesses and private landowners. We have streamlined the consultation and permitting components of the Federal Endangered Species Program. We have strengthened our historical commitment to basing species conservation decisions on sound science. We have increased Federal agency, State, Tribal, and private sector involvement in species conservation. We are proud that our efforts have produced better species conservation and recovery, while promoting cooperation rather than confrontation.

Key reforms have included:

- Using Candidate Conservation Agreements to remove threats and prevent species from becoming endangered or threatened;

- Providing certainty to landowners through Habitat Conservation Plans (HCPS) and the use of new tools like "No Surprises" assurances and "Safe Harbor" agreements; Instituting improved peer review processes and ensuring that sound science underlies all listing and recovery actions;

- Increasing the state role in species conservation and recovery;

- Issuing a landmark Secretarial Order harmonizing ESA implementation with Tribal trust responsibilities;

- Streamlining processes for Habitat Conservation Plans and Section 7 consultation; Improving monitoring programs under sections 7 and 10, and increasing the use of adaptive management to

ensure the successful implementation of Habitat Conservation Plans; and

Beginning efforts to more promptly recover, downlist and delist species.

I am submitting for the Record a number of Appendices to my statement. Appendix I contains a copy of "*Making the ESA Work Better*," a publication outlining the many reforms enumerated above.

The Administration recognizes that increased funding support is essential to continue our successful record of reform. Therefore, I am pleased to highlight a budget increase for the Endangered Species Program in the President's FY 1999 proposal that will provide the Service the capability to provide greater technical assistance to private landowners and to greatly expedite recovery of species and their eventual delisting.

Our goal is to implement the ESA in a consistent manner between the Service and the National Marine Fisheries Service, as well as among all the various Regional and Field Offices of the two agencies. Obviously, this is no easy task. The Service has 7 Regional Offices and 78 Ecological Service Field Offices, as well as numerous Refuges, Hatcheries, and Fisheries offices, that contribute to implementation of the ESA. To promote consistency, the Service has co-issued with the National Marine Fisheries Service (NMFS) numerous handbooks and directives, and provided extensive employee training. This is an ongoing collaborative process that is refined as receive input and questions from the field, where implementation is occurring.

I would now like to address the five issues identified in your letter of invitation to this hearing.

Issue 1: *The criteria and process for issuance of section 10 incidental take permits.*

Section 10(a) of the ESA sets the criteria and process for issuance of incidental take permits. These statutory requirements are interpreted and detailed in the Services' implementing regulations, administrative guidelines in the Services' *Habitat Conservation Planning Handbook*, and the Services' final "No Surprises" rule. A copy of that Handbook is Appendix 2 to my statement. Section 10(a)(2)(A) of the ESA requires an applicant to develop a conservation plan before an incidental take permit can be issued. Conservation plans under the ESA have come to be known as "habitat conservation plans" or "HCPS" for short.

STATUTORY REQUIREMENTS

In the 1982 amendments to the ESA, Congress established a mechanism allowing a permit for the "incidental take" of endangered and threatened species by non-Federal entities (i.e., take that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity"). The permit allows a landowner to legally proceed with an activity that would otherwise result in illegal take. Prior to 1982, take could only be permitted for scientific purposes or to promote species conservation through activities like captive breeding. The section 10 (a)(1)(B) "incidental take permit" process was designed to address non-Federal land or water use or development activities that do not involve a Federal action subject to section 7 consultation. The ESA does not prohibit taking of listed plant species on non-Federal land, unless it is prohibited under State law. Nevertheless, issuance of an incidental take permit is a Federal action subject to consultation under section 7 and consultation must address any effects of an HCP on listed plant species. A permit may not be approved if it would result in Jeopardy to a listed plant or animal species.

DETERMINATION OF TAKE

The first steps in the process leading to an HCP and an incidental take permit are the determination that take is likely to occur during a proposed non-Federal activity, and a decision by the landowner or project sponsor to apply for a permit, which must be approved by the Service. Service biologists work with landowners, assessing the situation, advising them how their activities may impact the species, and providing guidance about the HCP application process. While Service personnel provide detailed guidance and technical assistance throughout the process, the development of an HCP is driven by the applicant. The applicant, with the Service's technical assistance, first considers whether take during proposed project activities can be avoided through relocation of project facilities, timing restrictions, or similar measures, depending on the nature and extent of the proposed activity and the biology of the species involved. If take cannot be avoided, the Service then recommends that an incidental take permit be obtained.

Once the decision to obtain a permit has been made, the section IO process consists of three phases: (1) Habitat Conservation Plan development; (2) permit processing; and (3) monitoring and reporting.

HABITAT CONSERVATION PLAN DEVELOPMENT PHASE

The HCP development phase is the period during which the applicant's project or activity is integrated with species protection needs. This phase is typically conducted by the applicant with technical assistance from Service Field Office biologists and ends when a "complete application package" is forwarded to the appropriate permit issuing office. A complete application package consists of a permit application form, a fee for processing, a completed HCP, a draft National Environmental Policy Act (NEPA) document, and in some cases, an Implementing Agreement: An agreement between the applicants, the Service and any other entity involved that establishes a common understanding of the actions that will be undertaken to minimize and mitigate the effects on listed and unlisted species and their habitats in the proposed project area.

An HCP specifies: ,

- (1) the impacts likely to result from the take;
- (2) the measures the pen-nit applicant will undertake to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
- (3) the alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
- (4) other measures that may be necessary or appropriate to consider for a specific plan.

PERMIT PROCESSING PHASE

The permit application processing phase involves review of the application package by the appropriate Regional Office, announcement in the *Federal Register* of the receipt of the permit application, availability of the NEPA analysis for public review and comment, intra-Service consultation under section 7 of the ESA, and determination of whether the HCP meets the requirements of the Endangered Species Act.

Authority to approve HCPs and issue incidental take permits is delegated to the Services' Regional Directors and those decisions are based on several explicit findings:

Take will be incidental to an otherwise lawful activity;

Impacts will be minimized and mitigated to the maximum extent practicable;

Funding will be provided to properly implement the HCP;

Take will not appreciably reduce the likelihood of survival and recovery of the species;

and

Other necessary or appropriate measures in the HCP are met.

If the Service, after considering public comment, finds that the HCP is complete and the permit issuance criteria have been satisfied, a permit is issued.

The basic procedures are uniform and are followed in the processing of all HCPS. However, specific document and processing requirements will vary depending on the size, complexity, and impacts of the HCP involved. The Service works to complete all steps as expeditiously as possible. Procedurally, the most variable factor in permit processing is the level of N-EPA analysis required for the proposed HCP due to the size or scope of the proposed action.

In order to encourage HCP development and manage the associated workload, the Services have streamlined the development and application process and produced an HCP Handbook as a guide (see Appendix 2). The handbook makes a number of improvements over the prior process. First, the handbook establishes a category of "low-effect HCPS" applying to activities that are minor in scope and impact. These HCPs receive faster handling during the permit processing phase. Second, the handbook provides clear guidance to Service personnel about section 10 program standards and procedures. Third, the handbook outlines numerous mechanisms to accelerate the permit processing phase for all HCPS. Finally, specific time periods are established in the handbook for processing an incidental take permit application once an HCP is submitted to the Service:

HCP With an Environmental Impact Statement

HCP With an Environmental Assessment

Low-effect HCP

less than 10 months;

3 to 5 months; and

less than 3 months.

MONITORING AND REPORTING

After the permit has been issued, monitoring and reporting activities are key to the success of an HCP. Monitoring is essential in determining whether the provisions have been implemented, if the implemented provisions meet the conservation goal, and in identifying conservation actions that are working well for use in other similar HCP situations. If monitoring reveals that the conservation actions are not meeting the species' needs and adaptive management provisions for this purpose were incorporated into an HCP during

the development stage, mutually agreed upon adjustments could be employed to modify those actions and improve their effectiveness. To ensure effective and consistent monitoring of HCP implementation, newly adopted guidance provides the field and regional offices with monitoring standards.

The Service or any party designated as responsible by the Service (e.g., a State wildlife agency, local government, or the applicant) in the HCP is required to monitor the project for compliance with the terms of the incidental take permit and HCP. Any party responsible for monitoring compliance with a permit must report periodically to the Service in order to maintain the Service's overall oversight responsibility for the implementation of the HCP's terms and conditions. For regional and other large-scale or long-term HCPs, monitoring programs must provide long-term assurances that the HCP will be implemented correctly, and that monitoring for compliance and desired results will be conducted. This includes periodic accounting of take, surveys to determine species status in project areas or mitigation habitats, and progress reports on fulfillment of mitigation requirements. Monitoring plans for HCPs establish target milestones, to the extent practicable, or reporting requirements throughout the life of the HCP, and address actions to be taken in case of unforeseen circumstances.

MITIGATION AND ENFORCEMENT

Minimization and mitigation actions are required under Section 10 and consist of measures that reduce or offset potential adverse effects of a proposed activity on species covered by an HCP. They address specific needs of the covered species involved and must be measurable and enforceable. Through minimization and mitigation, development can proceed along with species conservation efforts.

The operating conservation program of an HCP is project-dependent and may take many forms. Commonly employed mitigation measures include preservation of some or all existing habitat, enhancement or restoration of degraded or former habitat, creation of new habitats, establishment of buffer areas around existing habitats, modifications of land use practices, and restrictions on human access. Although no specific HCP mitigation standards are specified under the ESA, the Service is committed to using the best scientific information available during the development, review, and monitoring of HCPs and ensuring that conservation strategies are as consistent as possible.

The HCP Handbook states that the minimization and mitigation strategies should take into account listing information and recovery plans, which are peer reviewed, as well as all other scientific and commercial data available. Certain conditions may also apply to these strategies, for example, when a mitigation program involves creation of new habitat or restoration of degraded habitats, HCP permittees must ensure that techniques used are proven and reliable or, if relatively new, that contingency measures or adaptive management procedures are included to correct failures, if they should occur. The Service often incorporates adaptive management concepts into the HCP to minimize the uncertainty where there are significant data gaps in the scientific information regarding a species. The Handbook also states that, where appropriate, technical scientific comments should be solicited from species experts within or outside the Services and from the recovery team, and from the public during the comment period for the HCP permit. Also, the intra-Service section 7(a)(2) consultation conducted requires the use of "the best scientific and commercial data available" for fulfilling the provisions of the ESA, as well as addressing any potential adverse modification of critical habitat."

While an incidental take permit has an expiration date, some of the mitigation identified in the HCP can be in perpetuity, such as establishment of protected areas. Violation of the terms of an incidental take permit would result in illegal take under section 9 of the ESA. If the violation is deemed technical and inadvertent

in nature, the Service sends the permittee a notice of noncompliance by certified mail or recommends alternative actions to the permittee in order to regain compliance with the terms of the permit.

REGULATORY CERTAINTY

In addition to the streamlining of procedural requirements for developing and approving HCPS, another major reason for the vast growth in the use of HCPs by landowners is the incentive provided through the "No Surprises" policy. This policy guarantees certainty for private landowners who provide conservation benefits to species. The 1994 No Surprises Policy, which was the basis for a recently issued final rule, was developed to reduce the concerns and fears of private landowners that further regulatory restrictions might be imposed if they enter into an agreement with the government.

The Services' No Surprises final rule (February 23, 1998, 63 FR 8859) establishes a simple principle. The Federal Government will not require, without the consent of the permittee, the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, including quantity and timing of water delivery, or other natural resources beyond the level otherwise mutually agreed upon for the species covered by the conservation plan. These assurances will be provided if the permittee is abiding by all of the permit terms and conditions in good faith or has fully implemented their commitments under an approved HCP when negotiating provisions for unforeseen circumstances. This rule does not preempt or affect any Federal reserved water rights.

If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Service may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Moreover, as previously noted, such additional conservation and mitigation measures may not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan, without the consent of the permittee.

Issue 2: *A general description of the habitat conservation plans issued throughout the Service's Regions.*

SUMMARY OF PERMITS ISSUED

In just a few years, the HCP process has been transformed from relative obscurity to one of tremendous prominence in species conservation. Prior to 1992, only 14 HCPs were in place. As of January 30, 1998, 230 HCPs had been approved, covering 5.9 million acres and protecting hundreds of species, and we expect by fiscal year 1999 there will be approximately 400 HCPs in some stage of development or implementation. Not only has the number of HCPs grown, but their size and complexity have greatly increased in recent years. Most of the earlier HCPs were for planning areas of less than 1,000 acres, but of the more than 200 HCPs approved as of September 1997, approximately 25 exceeded 10,000 acres; 25 exceeded 100,000 acres; and 18 exceeded 500,000 acres.

HCPs have evolved from a process adapted primarily to address single developments, to one that includes broad-based, landscape-level planning tools utilized to achieve long-term biological goals. Large-scale,

regional HCPs have significantly reduced regulatory burdens on small landowners by providing efficient mechanisms for compliance, distributing the economic and logistical impacts of endangered species conservation, and bringing a broad range of landowner activities under legal protection of HCPs.

One of the great strengths of the HCP process is its flexibility. Conservation plans vary enormously in size and scope and in the activities they address--from half-acre lots to millions of acres, from forestry and agricultural activities to beach development, and from a single species to dozens of species. Another key is creativity. The ESA and its implementing regulations establish basic biological standards for HCPs but otherwise allow creativity on the part of the applicants. As a result, the HCP program has produced remarkable innovation. The booklet "*The Quiet Revolution*" provides many HCP examples (See Appendix 3) and Appendix 4 provides a complete list of all current HCPs. Examples follow of some of our most successful HCPs around the country.

REGION I

Central and Coastal Orange County

Location: California Acreage: 208,000

Species Covered: This HCP will protect 7 listed species and 37 other rare species including the coastal California gnatcatcher, peregrine falcon, Riverside fairy shrimp, arroyo southwestern toad, least Bell's vireo, southwestern willow flycatcher, and the Pacific pocket mouse.

Challenge: The Service, along with Orange County, the Irvine Company and 11 other participating landowners worked to develop the first California Natural Community Conservation Planning Program aimed at providing continued economic development and the protection of plant and wildlife populations and the habitats upon which they depend.

Benefit: The implementation of the HCP provides a long-term growth plan for the area and establishes a 37,000 acre Reserve System containing approximately 18,500 acres of coastal sage scrub, 7,000 acres of chaparral, 5,700 acres of grasslands, and other habitat types. The HCP includes guidelines ensuring that any future development in the area will protect the reserve.

REGION 2

Balcones Canyonlands

Location: Texas

Species Covered: This HCP conserves 8 listed species--golden-cheeked warbler, blackcapped vireo, and 6 cave invertebrates and 27 rare species that are not Federally protected.

Acreage: 111,428

Challenge: The Austin area is an extremely fast-growing metropolitan area. The HCP was needed to allow necessary development for the expanding growth of the community while protecting listed species.

Benefit: The public will gain a large preserve that will protect species and watersheds while providing outdoor open-space opportunities. Economic growth and land planning will be able to proceed without

jeopardizing plants and animals, and decisions over endangered species issues will return to local control.

REGION 3

Kamer Blue Butterfly (Pending)

Location: Wisconsin

Acreage: Statewide

Species Covered: Kamer blue butterfly

Challenge: A statewide approach is currently under development which allows for large-scale ecosystem planning and alleviates the need for processing multiple individual permits. The Wisconsin Department of Natural Resources is the lead agency in this planning effort and is working with 28 partners, including county forests, utility companies, and the forest products industry, The Nature Conservancy, and the Wisconsin Departments of Agriculture and Transportation.

Benefits: This HCP, once completed, will allow the Kamer blue butterfly to be conserved while the habitat it depends on is still used and is managed on an ecosystem scale, in turn, conserving other species,

REGION 4

Homeowner

Location: Florida Acreage: 0.5

Species Covered: Florida scrub jay

Challenge: The challenge facing a private landowner was how the Service could help her develop a plan that allowed her to build a private residence in scrub jay habitat while protecting the listed scrub jay.

Benefits: The private landowner was able to build a private residence on land inhabited by the threatened scrub Jay. The HCP also promoted native landscaping as a means to offset the minor loss of jay habitat from the construction of the residence.

The Potlatch Corporation

Location: Arkansas Acreage: 15,000

Species Covered: Red-cockaded woodpecker

Challenge: The Potlatch timber company believed that its current management activities benefited the red-cockaded woodpecker and complied with the law, but wanted certainty that its future plans could proceed without hampering survival of the woodpecker.

Benefits: The approved Potlatch HCP provides the company with flexible management options while ensuring that forty-four groups of red-cockaded woodpeckers on the company's lands will be maintained

and protected,

REGION 5

Massachusetts Division of Fisheries and Wildlife

Location: Massachusetts Acreage: 200 miles of coastline

Species Covered: Piping plover

Challenge: The Service and the Massachusetts Division of Fishes and Wildlife were challenged to develop an HCP that provides increased management flexibility to facilitate continued public access to public beaches, while reducing potential impacts to the piping plover population,

Benefits: The HCP conserves the piping plover population by limiting activities that can occur at any one site. Landowners participating in the plan are provided additional flexibility for managing their beach property and are provided a mechanism to allow vehicle access.

Issue 3: *The manner in which listing and delisting decisions are made.*

LISTING AND DELISTING

Procedures for listing and delisting species are set forth in Section 4 and the Services' listing regulations at 50 CFR 424. The Secretary is required to list or reclassify a species if, after reviewing the species' status based on the best scientific and commercial data available, it is found that the species is endangered or threatened, as defined in Section 3, because of any one or a combination of the following factors:

- (1) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (2) Overutilization for commercial, recreational, scientific, or educational purposes;
- (3) Disease or predation;
- (4) The inadequacy of existing regulatory mechanisms; or
- (5) Other natural or manmade factors affecting its continued existence.

Removal of a species from the list of endangered and threatened wildlife and plants must also be supported by the best scientific and commercial data available to the Secretary. A species may be delisted only if data substantiate that it is neither endangered nor threatened for one or more of the following reasons:

- (1) Extinction. Unless all individuals of the listed species had been previously identified and located, and were later found to be extirpated from their previous range, a sufficient period of time must be allowed before delisting to indicate clearly that the species is extinct.
- (2) Recovery. The principal goal of the Service is to return listed species to a point at which protection under the ESA is no longer required. A species may be delisted on the basis of recovery only if the best scientific data available indicate that it is no longer endangered or threatened because threats have been eliminated or minimized.

(3) Original data for classification in error. Subsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error.

All Field and Regional Offices adhere to the same standards when recommending the listing or delisting of a species as endangered or threatened. Guidance to the Field and Regional offices is provided by the Services' Listing Handbook (Appendix 5). While the research and recommendations come from the field biologists and are reviewed by the Regional offices, ultimately, to ensure consistency, the final decisions on all petition findings and listing actions, both proposed and final, rest with the Director.

CANDIDATE LIST

The Service maintains a list of "candidates" identified by accepted petitions and other sources (September 19, 1997; 62 FR 49398-4941 1). A candidate species is one for which the Service has substantial information to support a proposal to list. In general, species to be considered for listing are selected from among those recognized as candidates in accordance with the Service's listing priority system.

In order to determine if a species is in need of Federal protection and should be added to the candidate list, Service biologists consider the species' current status, population trends and the threats to continued survival. After a species becomes a candidate, monitoring of its status continues. To collect status information, Service biologists work closely with scientific, conservation and corporate partners, other Federal agencies, and State and Tribal governments to compile and analyze data. A current candidate list 's Included in Appendix 6.

Information relevant in assessing the status and trends of a species for either listing or candidate determination includes the number of individuals, number of populations (biological security of many species is more a function of the number of healthy populations than of the total number of individuals in the wild), size of populations (small isolated populations are highly vulnerable to extirpation, and thus contribute less to the overall security of a species), historic and current rate of decline, current recruitment rates (belownormal recruitment may signify extreme vulnerability in a long-lived species, even though it exists in relatively large numbers), distribution of populations, quantity and quality of available habitat, and genetic diversity. The assessment of threats must include past and ongoing impacts and projected future impacts to the species. Threat assessment is also the prime consideration in determining priority in the listing process.

The Service works with a broad range of experts and institutions to ensure use of the best available scientific and commercial information. Candidate species information comes from many varied sources: The scientific community, including museums, universities, and scientific/professional societies; State heritage programs and wildlife, fish, and plant conservation agencies; The Nature Conservancy and other private conservation groups; other individuals such as consultants, knowledgeable amateurs, and industry biologists; Native American Tribal Councils; international specialists; Federal agencies; and other Service programs.

LISTING PRIORITIZATION

After determining that a species needs to be listed, it is long-standing Service policy that the highest priority be given to those species believed to face the greatest threat of extinction. The Service adopted guidelines on September 21, 1983 (48 FR 43098) (See Appendix 7), that govern the assignment of priorities to species

under consideration for listing. This system provides a rational way to allocate available appropriations to the highest-priority species when adding a species to the list or reclassifying a species. The system places greatest importance on the immediacy and magnitude of threats, but also factors in the degree of taxonomic distinctiveness by assigning priority in descending order to monotypic genera, full species, and subspecies.

In carrying out the listing program, four basic principles govern the Service's implementation process:

- (1) Highest priority is given to protecting species most in need, based on the priorities established in the 1983 guidance;
- (2) Biological need, not the preference of litigants, drives the listing process;
- (3) Sound science, including peer review, forms the foundation of each and every listing action; and
- (4) Public comment and participation in the petition and rulemaking processes are enhanced to ensure that the States, other Federal agencies, and the affected public are provided every opportunity to provide comments or information (See Figure 2).

LISTING MORATORIUM

Public Law 104-6, enacted in April 1995, established a moratorium on the issuance of final listing rules and rescinded \$1.5 million from the Service's listing budget for fiscal year 1995. This action and limitations on funding contained in the short-term Continuing Resolution virtually shut down the Service's listing program from October 1, 1995 to April 26, 1996. As a result, the Service faced a tremendous "listing backlog" after the moratorium was lifted: proposed listings for 243 species; petitions for 57; and 182 candidate species awaiting proposal. The Service faced the daunting task of allocating available resources to address this listing backlog. The Service published Final Listing Priority Guidance, on December 5, 1996 (See Appendix 8), providing an organized system for dealing with the workload. The guidance established four tiers or classes of listing actions as a way of allocating resources, preferentially, to those activities judged to be most urgent. The first tier included emergency listings required to forestall immediate threats to species. Less urgent listing actions were assigned to progressively lower tiers. Currently, the Service has achieved a more balanced listing program. By the end of FY 97 the Service had reduced the backlog of listing proposals from 243 to 99. Beginning in FY 98, the Service expects to also return to working on a limited number of reclassification and delisting actions. A proposal to adopt modified listing priority guidance for FY 98 will be published this week. Species that may be considered this year for delisting or reclassification include the American peregrine falcon, the Columbian white tailed deer, the Gulf Coast population of the brown pelican, the bald eagle and the Aleutian Canada goose.

Issue 4: *Funding of programs, allocation of employees, and other matters pertaining to implementation and enforcement at the regional level.*

Allocation Methodology

In FY 95, the Service adopted a workload-based budget allocation methodology for the Endangered Species Program in response to the Government Performance and Results Act of 1993 and subsequent directives from the Department of the Interior, the Office of Management and Budget, and the Service Director. The workload-based formulas were to be used in allocating the fiscal year 1996 budget, but as a result of severe

cuts in Endangered Species funding in FY 96 and the series of Continuing Resolutions that extended through Apr'l 1996, the workload-based allocation was only partially implemented in FY 96. The system has been fully implemented in allocating both the FY 97 and FY 98 Endangered Species Program budgets. Funding is allocated using this methodology and personnel allocations are tied to the dollar allocations.

Endangered species are not evenly distributed across the United States. Therefore, the goal of the workload-based allocation is to direct funding and personnel resources to areas of the country where fish and wildlife resources most require protection under the ESA. Areas of high biological diversity, including the endangered and threatened species often found in such areas, are more concentrated in some areas of the country than in others. The Service places priority on funding program activities in such resource-rich areas.

In addition to taking into account the geographic distribution of fish and wildlife resources, the Service considers other complexity factors in allocating Endangered Species Program funds. The costs of conserving members of certain taxonomic groups vary greatly. The number of States, territories, and countries of occurrence are used as a measure of the extent of the range of the species. Generally, the more widespread a species, the more costly will be conservation, consultation, and recovery measures. Such complexities are factored into the workload-based methodology used by the Service to allocate Endangered Species Program funds among Regions.

To allow for such resource-based prioritization while also ensuring that all Regions have a minimum level of funding necessary to fully participate in the Endangered Species Program, each Region receives a "capability funding" that is taken off the top before the funds are spread among Regions using the workload factors. The capability funding levels are set with the overall resources and demands of the program taken into account.

Issue 5: General criteria for requiring mitigation and examples of mitigation required in each region in the context both of section 10 permits and section 7 incidental take statements.

Section 10 permits are issued to non-federal entities where a determination of "take" is likely to occur during implementation of a non-federal activity. The applicant must "minimize and mitigate" to the maximum extent practical the impacts of any "take" authorized, and Service must ensure that the permit "is not likely to jeopardize the continued existence of listed species." Section 7 outlines procedures for Federal agency cooperation to conserve listed species. Section 7(a)(1) requires Federal agencies to use their authorities to further the conservation of listed species. Section 7(a)(2) requires Federal agencies to consult with the Service to ensure proposed Federal activities are "not likely to jeopardize the continued existence of listed species."

SECTION 7 CRITERIA

In addition to the section 7(a)(2) requirements of the ESA, section 7(a)(1) directs the Secretary (Secretaries of the Interior and Commerce) to review other programs administered by them and utilize such programs to further the purposes of the ESA. It also directs all other Federal agencies to utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of listed species.

Through section 7(a)(2), the Service consults formally on any action that is federally funded, authorized, or carried out that may affect a listed species. A biological opinion, the written statement provided through a formal consultation, presents the Service's opinion on whether or not the Federal action is likely to

jeopardize the continued existence of listed species, or result in the destruction or adverse modification of critical habitat. A copy of the draft handbook for conducting such consultations is Appendix 11 to my statement.

Section 7(b)(4) of the ESA requires that the Secretary, when consulting with a Federal agency on a proposed action that satisfies the requirements of section 7(a)(2), to " . . . provide the Federal agency and the applicant concerned, if any, with a written statement that. . . specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact. . . " of incidental take. The Service provides, as an attachment to a "non-jeopardy" biological opinion or to any reasonable and prudent alternative, a statement of anticipated incidental take with reasonable and prudent measures (RPMS) and terms and conditions, as appropriate, to minimize the impacts of the take. Terms and conditions are provisions to implement the RPMS. If adopted by the action agency, they also become binding conditions of any grant or permit issued to any applicant, as appropriate, for the incidental take exemption to apply. Terms and conditions of an incidental take statement must include reporting and monitoring requirements that assure adequate action agency oversight of any incidental take.

RPMS are actions the Secretary believes necessary or appropriate to minimize the impacts of incidental take. When preparing incidental take statements, the Services must specify RPMS and implementing terms and conditions, which involve only minor changes and that do not alter the basic design, location, scope, duration, or timing of the action to minimize the impacts of incidental take. Measures are considered reasonable and prudent when they are consistent with the proposed action's basic design, location, scope, duration, and timing. The Service cannot require mitigation for proposed project impacts through Reasonable and Prudent Measures.

For a determination of jeopardy or adverse modification of designated critical habitat, the Services are obligated to identify, if possible, Reasonable and Prudent Alternatives (RPAS) in the biological opinion. RPAs include those alternative actions identified during formal consultation that: (1) can be implemented in a manner consistent with the intended purpose of the action; (2) can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction; (3) are economically and technologically feasible; and (4) the Secretary believes would avoid the likelihood of jeopardizing the continued existence of listed species or the destruction or adverse modification of designated critical habitat.

If the Administration's budget request is fully funded, we will be in a position to further the streamlining of Section 7 consultations with Federal agencies and generally increase our ability to respond to the consultation needs of agencies and permit applicants, thus hopefully reducing or lessening additional litigation for agency activities.

SECTION 10 CRITERIA

The Service must ensure that the incidental take that may result from the proposed HCP is consistent with the section 10 issuance criteria (i.e., that it will not "appreciably reduce the likelihood of the survival and recovery of the species in the wild") and they must develop a mitigation program that is also consistent with the issuance criteria (i.e., that will minimize and mitigate "to the maximum extent practicable") or the permit cannot be issued. Mitigation programs for HCPs, however, will be as varied as the projects they address. Some will be simple, while those for large-scale, regional planning efforts may be quite complex. The Service must ensure that mitigation programs address the specific needs of the species covered by the HCP, while also ensuring that they are based on sound biological information and are commensurate with the impacts they address. A monitoring plan must also be developed that establishes reporting requirements and

biological criteria for measuring program success.

Mitigation actions under HCPs usually take one of the following forms: avoiding the impact (to the extent practicable); minimizing the impact; rectifying the impact; reducing or eliminating the impact over time; or compensating for the impact. For example, project effects can be (1) avoided by relocating project facilities within the project area; (2) minimized through timing restrictions and buffer zones; (3) rectified by restoration and revegetation of disturbed project areas; (4) reduced or eliminated over time by proper management, monitoring, and adaptive management; and (5) compensated by habitat restoration or protection at an onsite or offsite location.

In practice, HCPs often use several of these strategies simultaneously or consecutively. Mitigation measures required by individual Service offices for HCPs must also be as consistent as possible for the same species. This can be challenging when a species encompasses multiple geographic areas and the effects of the HCP may be biologically distinct, but consistency is essential. The Service should not apply inconsistent mitigation policies for the same species, unless differences are based on biological or other good reasons and are clearly explained. A first step is the establishment of specific standards (e.g., for survey methods, buffer zones, or mitigation methods), and consistent implementation of those standards. The Service coordinates these standards between biologists in the same office and between Regional Offices to ensure consistency throughout the nation. Mitigation standards are also developed in coordination with state wildlife agencies.

Critical Funding Needs

Clinton Administration Reforms

Employing the flexibility that past Congresses have built into the law, the Clinton Administration has used innovation and administrative reforms to craft a "*New Endangered Species Act*" over the past five years. As a result, America now enjoys the success of an ESA that works much better. Major steps have been taken to make the ESA more effective in conserving endangered and threatened species while enhancing its flexibility for businesses and private landowners. The ESA now produces cooperation instead of confrontation and conservation rather than chaos.

Escalating Workloads

As of January 31, there are 1,125 domestic species on the List of Endangered and Threatened Species; this represents nearly a doubling of the list in just 5 years. Accordingly, Section 7 (Interagency Cooperation), HCP and Recovery workloads have increased tremendously at the same time that the Administration has been working to streamline and expedite the consultation and HCP processes. By FY 99, the Service anticipates that approximately 400 HCPs will be completed or under development, constituting a four-fold increase in just the past 5 years. In addition, private landowner interest in two new conservation tools, Candidate Conservation Agreements and Safe Harbor Agreements, is already great and is expected to 'grow significantly. The demand for these new types of voluntary conservation agreements and the tremendous growth in the number of HCP applicants have combined to generate significantly increased workload pressures.

While trying to deliver all of the Administration's reforms and responding to the increased workload, the Endangered Species Program budget experienced a decrease in FY 96 and only modest increases in FY 97 and FY 98. To continue to implement fully the Administration's reforms and continue on a proactive course with other Federal agencies, the States, and private landowners, critical funding shortfalls must be

addressed.

The President's FY 99 Budget Request for Endangered species is a very important step in providing adequate fund'ng to allow the Serv'ce to prov'de technical assistance to landowners, to provide for financial incentives for pn'vate landowners to enter into Safe Harbor Agreements, for candidate conservation agreements, increases in the consultation program to assist other Federal agencies and to increase recovery actions. A copy of our budget justification is Appendix 9 to my statement. A paper explaining our allocation of funds between Regions is Appendix 10.

Both the Fish and Wildlife Service and the National Marine Fisheries Service have taken great efforts to ensure that their implementation of the ESA is scientifically sound and consistently enforced throughout the country. We believe that with the full implementation of the Administration's reforms, the Endangered Species Act will protect the biological resources of the Nation without imposing undue burdens on individual citizens.

Mr. Chairman this concludes my prepared testimony. I would be pleased to respond to any questions you might have.

LIST OF APPENDICES SUBMITTED WITH FORMAL STATEMENT

- Appendix 1:
Making the ESA Work Better
- Appendix 2: Habitat Conservation Planning Handbook
- Appendix 3: The Quiet Revolution
- Appendix 4: Current List of all HCPs Nationwide
- Appendix 5: Endangered Species Listing Handbook
- Appendix 6: Endangered and Threatened Species; Review of Plant and Animal Taxa;
Proposed Rule; 50 CFR Part 17; September 19, 1997.
- Appendix 7: Endangered and Threatened Species Listing and Recovery Priority Guidance;
48 FR 43098-43105, September 21, 1983 and correction at 48 FR 51985, November 15, 1983.
- Appendix 8: Endangered and Threatened Wildlife and Plants; Extension of Listing Priority
Guidance for Fiscal Year 1997; 62 FR 55268-55269, October, 23 1997.
- Appendix 9: FY 99 Budget Justification
- Appendix 10:

- Appendix 11:

White Paper on Funding Allocation

Section 7 Consultation Draft Handbook

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